SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 258

THE BALTIMORE AND OHIO RAILROAD COMPANY, BOSTON AND MAINE RAILROAD, ERIE RAILROAD COMPANY, ET AL., *Appellants,*

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND TEXAS CITRUS & VEGETABLE GROWERS AND SHIPPERS.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

MOTION OF TEXAS CITRUS & VEGETABLE GROWERS AND SHIPPERS TO AFFIRM

FRANK A. LEFFINGWELL,
Counsel for Appellee.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

Civil Action No. 8465 (3)

THE BALTIMORE AND OHIO RAILROAD COMPANY; BOSTON AND MAINE RAILROAD; ERIE RAILROAD COMPANY; GUY A. THOMPSON, TRUSTEE OF MISSOURI PACIFIC RAILROAD COMPANY; NEW ORLEANS, TEXAS & MEXICO RAILWAY COMPANY; THE BEAUMONT, SOUR LAKE & WESTERN RAILWAY COMPANY; THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY; INTERNATIONAL-GREAT NORTHERN RAILROAD COMPANY; SAN ANTONIO, UVALDE & GULF RAILROAD COMPANY, AND SAN BENITO AND RIO GRANDE VALLEY RAILWAY COMPANY; THE NEW YORK CENTRAL RAILROAD COMPANY; THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY; THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY; THE PENNSYLVANIA RAILROAD COMPANY; ST. LOUIS SOUTHWESTERN RAILWAY COMPANY; ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS; TEXAS AND NEW ORLEANS RAILROAD COMPANY; THE TEXAS AND PACIFIC RAILWAY COMPANY; WABASH RAILROAD COMPANY, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,

Defendant,

AND

INTERSTATE COMMERCE COMMISSION AND TEXAS CITRUS & VEGETABLE GROWERS AND SHIPPERS,

Intervening Defendants

MOTION TO AFFIRM

Texas Citrus & Vegetable Growers and Shippers, an intervening defendant herein, moves the Supreme Court to affirm the order of June 18, 1952, in which the three-judge

statutory court dismissed the complaint herein. In support of this motion, it respectfully shows:

I

The question on which the decision of this cause depends is so unsubstantial as not to need further argument. The trial court had before it motions to dismiss on the ground that the complaint failed to state a cause of action. After argument by the parties, the court granted the motions to dismiss. The plaintiffs did not amend their pleadings but appealed the ruling to the Supreme Court. The sole question at issue is whether the trial court erred in sustaining the motions to dismiss. Plaintiffs claim that the Commission's order under attack was void because:

(a) The Commission was arbitrary, capricious and abused its discretion.

(b) The prescribed rates were, and are, confiscatory.

II. Arbitrary Action

The Commission held two hearings, one in Texas and one in California. All parties were given ample opportunity to submit evidence. A proposed report was served by the presiding examiner and exceptions were filed thereto. The case was then argued before the entire Commission. A final decision was rendered December 21, 1950. On March 16, 1951, the plaintiffs herein asked for reopening and further hearing to permit them to submit testimony they had not previously offered. They did not allege that evidence was newly discovered and they did not comply with the Commission's rules as to what must be shown to obtain a further hearing.

The Commission refused to grant a further hearing, based on the petition filed, but it did reconsider the case on the record and amended its previous decision. The trial

Court properly held that the facts reflected in the pleadings did not show that the Commission had abused its discretion. The Supreme Court should affirm that holding.

III. Confiscation

Paragraph X of the complaint alleged that the prescribed rates would yield revenues less than the cost of service but, other than general statements of that nature, plaintiffs alleged no facts which would constitute taking their property without due process of law. The mere statement that the Fifth Amendment has been violated is not sufficient.

But the exhibits attached to the complaint, and made a part thereof, contain many statements of fact that directly contradict the statement that the prescribed rates are "confiscatory". To illustrate:

As shown on page 677 of Ex. 1 of the complaint, the plaintiffs published rates in 1940 which yield substantially less revenue than the prescribed rates. Those rates had been increased 49 per cent, with a maximum of 42 cents per 100 lbs., at the time the Commission's second decision was issued. With those increases, the earnings per car are shown below at representative distances, compared with revenues under the prescribed rates.

Distance Miles	Voluntary Rates	Prescribed Rates
700	$122.66	$282.80
800	140.18	299.60
900	157.70	316.40
1000	175.22	333.20

NOTE: The above rates are now subject to a further increase of 15 per cent, with a maximum of 12 cents per 100 lbs.

The voluntary rates were published to retrieve traffic from the trucks and must be considered to be compensatory. If they yield more than out-of-pocket cost of transportation, the prescribed rates can not possibly be confiscatory. Those

voluntary rates have been given a good trial. They have remained in effect for 12 years, except for the general increases applied to all traffic since 1940.

Page 701 of Ex. 1 of the complaint gives information concerning present rates on five vegetables from California and Texas to various destinations. The prescribed rates are shown in Ex. 4. No reductions were prescribed on Cabbage, Onions and Potatoes. We show below examples taken from Exhibits 1 and 4 which reflect a comparison between rates and per-ton-mile revenue voluntarily published and applied from California and the prescribed rates here under attack:

		From California		From Texas			
		Present		Present		Prescribed	
Destination	Commodity	Rate (Cts)	PTM Rev (Mills)	Rate (Cts)	PTM Rev (Mills)	Rate (Cts)	PTM Rev (Mills)
Detroit, Mich.	Carrots	167	13.2	154	19.9	149	19.2
	Tomatoes	206	16.3	159	20.5	No change	
New York City	Carrots	192	11.9	172	17.2	167	16.7
	Tomatoes	217	13.5	188	18.8	182	18.2
Pittsburgh, Pa.	Carrots	175	12.7	158½	19.1	153	18.4
	Tomatoes	215	15.6	165	19.9	No change	

NOTE: All of the above rates are now subject to an increase of 15 per cent, with a maximum of 12 cts. per 100 lbs.

The California rates voluntarily published and continued for many years, except for general increases, can not be considered less than compensatory. The prescribed rates here under attack yield substantially greater revenue per ton mile than the voluntary rates from California. Normally, the rates applicable through the Rocky Mountains and west thereof should be 15 per cent higher than the rates in the territory east of the Rockies where the prescribed rates apply. See *Fresh Green Vegetables from Idaho and Oregon*, 253 I.C.C. 143, 149-150.

There are numerous other rates shown in Ex. 1 of the complaint indicating that the plaintiffs in this cause have

for twenty years or more voluntarily published and applied rates on vegetables that yield substantially less revenue per car mile and per ton mile than the prescribed rates here under attack. The court may assume that they would not voluntarily continue handling vegetable shipments all of those years at rates yielding confiscatory revenue. Those facts, all of which are contained in the pleadings, completely negative the allegation that the prescribed rates are confiscatory. This complaint is similar to one seeking to collect a debt from a man alleged to owe the plaintiff $50.00 though the pleadings show that the plaintiff owes the same man $100.00.

In granting motions to dismiss the trial court did not abuse its discretion. If plaintiffs have a cause of action, their remedy is to amend their pleadings so as to allege a cause of action.

Wherefore, the Texas Citrus and Vegetable Growers and Shippers respectfully moves that the decision and order of the trial court be in all things affirmed.

Respectfully submitted,

FRANK A. LEFFINGWELL,
1515 Praetorian Building,
Dallas 1, Texas.
Attorney for Intervening Defendant.